BEFORE THE ENVIRONMENTAL APPEALS BOARD

FOR THE STATE OF DELAWARE

In the Matter of The Premcor Refining Group Inc.	EAB No. 2004-02

STIPULATION AND REMAND WITH INSTRUCTIONS

WHEREAS, after public notice and hearing, the Secretary of the Department of Natural Resources and Environmental Control ("DNREC") issued permit no. APC-90/0264-OPERATION (Amendment 2)(NSPS) ("Operating Permit") to Premcor Refining Group Inc., ("Premcor") relating to the operation of two 175 psia steam eductor systems, one each on the Sulfur Recovery Unit ("SRU") I and SRU II sulfur pits at the Sulfur Recovery Area at the Delaware City Refinery;

WHEREAS, on August 24, 2004, Premcor appealed DNREC's action in issuing the Operating Permit based on the emission limitations for particulate matter set forth in Section 2.1.5 and the testing requirements set forth in Section 4.2 of the permit;

WHEREAS, after public notice and hearing, on November 30, 2004, DNREC issued permit no. APC-90/0264-CONSTRUCTION (Amendment 6)(NSPS), Sulfur Recovery Area ("Construction Permit"). Section 2.1.5 of the Construction Permit imposes emission limitations for particulate matter that differ from the emission limitations contained in Section 2.1.5 of the Operating Permit for the same equipment. Section 1.5 of the Construction Permit states, however, that "[t]he conditions in the existing operation permit shall remain in effect until construction authorized by this permit is completed."

WHEREAS, the construction authorized by Amendment 6 is not anticipated to be completed until December 31, 2006;

WHEREAS, modification of the Operating Permit to make the particulate matter emission limitations in the Operating Permit applicable now, (which is the same as the emissions limitations in Condition 2.1.5. of the Construction Permit that otherwise would become applicable in approximately December of 2006) would resolve without further litigation the issues underlying the appeal pending in this case;

BY STIPULATION OF THE PARTIES and ORDER of the Environmental Appeals Board,

IT IS HEREBY STIPUATED AND AGREED AMONG THE PARTIES as follows:

1. Within 10 days following the execution of this Stipulation by all parties and the remand Order of the Environmental Appeals Board, DNREC will publish a public notice of its intent to modify the Operating Permit to make the particulate matter emission limitations in Condition 2.1.5 of the Construction Permit applicable upon signature of an Order effectuating same by the Secretary.

2. The public notice will allow a time period of 10 days for the public to submit comments to DNREC; and DNREC will not take action on the matter prior to the expiration of the public comment period. DNREC will provide Premcor with copies of any public comments DNREC receives, and Premcor shall have 7 days from its receipt of any public comment to provide DNREC with its response, if any, thereto.

3. Within 10 days of the later of expiration of (i) the 10-day public comment period or (ii) the 7-day period for Premcor to respond to any public comment, DNREC agrees to either

modify the Operating Permit to make the particulate matter limitations contained in Section 2.1.5 of the Construction Permit applicable upon signature of a Secretary's Order effectuating the change, or issue a Secretary's Order explaining why it failed to make the agreed to modification based on public comments. DNREC shall provide to the Board and Premcor a copy of the Secretary's Order either modifying the permit or explaining why he failed to make the change.

4. If DNREC issues a Secretary's Order explaining its failure to make the agreed to modification, Premcor may appeal from such order to the Environmental Appeals Board, and in such appeal Premcor may raise any issue and rely upon any evidence that it could raise or rely upon in the present appeal, as well as any other issues or evidence permitted by law or regulation. If DNREC issues a Secretary's Order modifying the permit as specified above, this appeal shall remain closed.

Dated: 1-6-05

John A. Hughes, Secretary
Department of Natural Resources
& Environmental Control
89 Kings Highway
Dover, DE 19901

Dated: 1-6-05

Valerie S. Csizmadia
Deputy Attorney General
Department of Justice
102 W. Water Street
Dover, DE 19904
Attorney for the Secretary of DNREC

W. Harding Drane, Jr.

Dated: January 6, 2005

W. Harding Drane, Jr., Esquire
Potter, Anderson & Corroon LLP
Hercules Plaza – Sixth Floor
1313 N. Market Street
Wilmington, DE 19801
Attorney for The Premcor Refining Group Inc.

Based on the foregoing, IT IS HEREBY ORDERED that this matter is REMANDED to the Department of Natural Resources & Environmental Control for the Secretary to consider the amendment of the applicability date of the particulate matter emission limitations as provided above.

Dated: February 22, 2005

Nancy J. Shevock
Chair
Environmental Appeals Board

~~SALIBA~~
PREMCOR

Dated: 2/22/05

Stanley Tocker, Ph.D.
Board Member

Peter McLaughlin
Board Member

Dated: 2/22/05

Dated: 2/22/05

Harold Gray
Board Member

Dated: 2/22/05

Tjark Bateman
Board Member

Dated: 2/22/05

~~Kathryn Way~~ GORDON WOOD
Board Member

2-9-2001

BEFORE THE ENVIRONMENTAL APPEALS BOARD

FOR THE STATE OF DELAWARE

PUBLIC WATER SUPPLY CO.,	)	
	)	
Appellant,	)	
v.	)	Appeal No. 97-01
	)	
TUNNELL COMPANIES, L.P., and the	)	
	)	
SECRETARY OF THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL, CONTROL OF THE STATE OF DELAWARE,	)	
	)	
Appellees.	)	

FINAL ORDER AND DECISION UPON REMAND

Pursuant to due notice of time and place of hearing served on all parties in interest, the above stated cause came before the Environmental Appeals Board on October 17, 2000, at the Tatnall Building, William Penn Street, Dover, Kent County, Delaware. Deliberations by the Board occurred on December 12, 2000, at the Richardson & Robbins Building, 89 Kings Highway, Dover, Kent County, Delaware.

PRESENT:

Joan Donoho, Chairperson

Donald Dean, Member

Robert Ehrlich, Member

Diana Jones, Member

Kevin R. Slattery, Attorney for the Board.

APPEARANCES:

Jeremy W. Homer, Esquire, for the Appellant, Public Water Supply Company
John Sergovic, Esquire, for the Appellee, Tunnell Companies, L.P.
David Ormond, Deputy Attorney General, for the Appellee, DNREC

A hearing was held before the Environmental Appeals Board ("Board") on October 17, 2000, pursuant to the Board's decision to hear additional evidence upon a remand from the Superior Court. The Board further considered argument from counsel on the legal issues framed by the Superior Court in its remand decision dated February 29, 2000.

The appellee, Tunnell Companies, L.P. ("Tunnell") contends that where other agencies have a sphere of influence in the supply of water a Certificate of Public Convenience and Necessity ("CPCN") may not be necessary. Tunnell argues the Division of Public Health ("DPH") has the primary responsibility for regulating public water supplies. That agency is in charge of testing water at the tap, and there is no need for CPCNs. Tunnell argues that the Public Service Commission's ("PSC") primary function is to regulate rates. In support of this argument, Tunnell proffers that there are a number of water suppliers not regulated by the PSC because they do not charge directly. Certain municipal and private water systems are not regulated by the PSC and do not have a CPCN. The State Fire Marshall's office has an interest in delivery systems, but that office is involved only at the initial phase of development. Therefore, a CPCN does not impact that agency's interest.

As to how this new evidence is probative on the issue of whether there is a significant public impact, Tunnell contends that the public is protected by the numerous agencies involved. Tunnell argues that the while PWSC holds the CPCN for a particular area, this does not mean it has to be an exclusive provider. The CPCN protects it from competing water companies which Tunnell is not.

Tunnell further notes that the Board may not even have to address the issue set

forth above due to the amendments to 7 Del. C. section 6007(7) in April of 2000.

The appellant, PWSC contends the basic issue before the Board is whether Tunnell is a public utility. PWSC argues that it is not relevant whether mobile home parks have traditionally supplied their own water. The permits in this case were issued under the erroneous assumption that only the environmental issues were to be addressed by the agency, and they were not issued after considering how Tunnell's supplying of water to Baywood Greens affects consumers from a public utility standpoint. PWSC further disagrees with Tunnell's argument that there is a hierarchy of agencies dealing with water supply--with DPH at the top--and that PSC oversight is not needed. PWSC contends that the PSC deals with all aspects of water supply. Furthermore, other agencies' standards can be violated when DPH standards are not. This is all a red herring.

As to the new laws, PWSC contends that you can't get a water well permit if you are a "water utility" operating in an area already under another utility's CPCN.

The agency notes that the parties did not focus on economic issues or public utility issues when the case last came before the Board.

SUMMARY OF THE EVIDENCE

The Board considered the testimony of Constance McDowell via affidavit.

Ms. McDowell testified that the PSC does not issue CPCNs and has not since the early 1980's. Historically, the PSC investigates the need for rate adjustments by regulated entities.

The Board considered the testimony of Edward G. Hallock.

Mr. Hallock testified that he is the program administrator for the office of drinking water at the DPH. He is responsible for potable water systems. DPH is not concerned with the cost of the water--just the safety of the water. His office tests water systems on a monthly basis for bacteria and on a yearly basis for chemicals and minerals. Some of the water systems do their own independent testing--but typically not for compliance purposes. No other agency does this testing. The DPH tests for primary standards--involving health concerns--and secondary standards--involving aesthetic concerns such as smell and taste. This is required by law for all suppliers of over 500 service connections.

The Environmental Protection Agency ("EPA") requires all community water systems to send out a bulletin every year showing contaminants. They only have to notify the consumers if there is a problem--i.e., the standards are exceeded. The annual report gives the consumers information about the water system, what contaminants are present, and to whom they can go to address those problems.

Mr. Hallock further testified that the DPH works with the supplier to correct a problem. If the supplier is not cooperative, the DPH can administratively enforce the regulations and impose penalties. The EPA can also "overfile" if they wish. If there is a consumer complaint, the complaint is investigated including the collection and analyzing of samples. The agency gets very few calls with regard to the annual reports. The PSC calls them if they have any questions regarding the water quality, and DPH shares this information with the PSC.

Mr. Hallock also testified that DPH reviews plans for new water systems with their

engineer covering the plan from the pump to the tap. PSC does not do this with regard to the initial review. DPH is in the process of getting all the operators licensed–a statutory requirement. As to water pressure, DPH requires no less than 25 psi and no greater than 100 psi. They do not do routine testing for line pressure: for this they rely on complaints.

The Board considered the testimony of Kevin Burdette of McCrone Engineering.

Mr. Burdette testified that he has worked on water systems in Delaware since 1986 and is a licensed Delaware well driller and water system operator. He created the attachment to the McDowell affidavit. He has worked on approximately 75 of the systems identified in the attachment–either in planning or development. Of the 75, he installed the wells on fifteen. These included Angola Beach (600 homes) and Cape Windsor (249 homes) which are mobile home parks and do not have CPCNs. Cape Windsor sells its lots while Angola Beach is operated by the developer. He also worked on the Country Rest Home (in 1985)--a retirement community. In 1992 he installed the system in the Donovan Smith Mobile Home Park (123 homes) . He did the Meadows at Cubbage Pond in 1990. In 1992 he installed the well and made treatment systems modification at Swann Keys (575 homes). In 1989 he installed the well for Twin Cedars apartments--approximately a 45 unit apartment building complex. He worked on the Delaware State Fair water system in the last three years. It serves the fair grounds and the slots facilities (several thousand people each day). In 1980 and 1990 he worked on the systems for the Dover Air Force Base housing complexes (585 housing units). They are self-supplied and are not regulated by the PSC. In 1992 he worked on the system at Holly Hill estates (277 units)--a landlord operated system. At Winterthur museum he conducted a study in 1997. The museum has

25 service connections, but it serves 1200-1500 persons each day. He worked on the Three Seasons camping resort in 1993 (235 connections). That is also owner operated and non-PSC regulated. All the systems noted are self-supplied and not regulated by the PSC.

Mr. Burdette further testified that he also assists in making the annual reports for certain suppliers. DPH usually works with the operators to solve any problems, or the operators risk losing their licenses. Municipal systems as well are not regulated by the PSC. He worked with the towns of Millsboro, Selbyville, Frankford, Milford and Dover among others. Some of these systems exceed their municipal boundaries. Typically there are differing charges between in-town and out-of-town consumers. This still does not subject them to PSC regulation. He has worked on several large, self-supplied systems located within a large supplier's area--Mountaire (within Selbyville), Conagra (Milford), Perdue (Georgetown), Playtex (Dover), Townsends (Georgetown), and others. These self-suppliers are regulated by DPH and not the PSC.

The Board considered the testimony of Gregory W. Haley.

Mr. Haley testified that he is the Chief of Technical Services for the State Fire Marshal's office. He has held the position for a total of 6 years. The State Fire Marshal's office has concerns with safety and sufficient water supply to fire systems. Once in place, they have no regulatory authority over water supply systems. As to an extension of a water supply system, they cannot require the supplier to do anything. With respect to a new development, they exert control over the developer through the county land planning process. A development plan will not be recorded until their issues are satisfied. As

regards sprinkler systems, the Fire Marshall has a concern with inadequate volume or pressure in some areas of the state. They have required a developer to install separate tanks or booster pumps. There have been problems with non-franchise (non-CPCN) suppliers and water pressure. They have been able to resolve those problems.

On examination by the Board, the witness testified that the water to sprinkler systems is not potable.

The Board considered the testimony of Stewart Lovell via affidavit.

Mr. Lovell testified that he is employed by DNREC in the water supply section and has been so employed since1987. From 1987 to present, the water supply section did not take into consideration whether a CPCN was required of, or held by, the applicant.

The Board considered the testimony of Thomas Herholdt.

Mr. Thomas Herholdt testified that he has been employed by Tidewater Utilities for two years as superintendent of the southern division. Prior to that he worked as vice president of operations for PWSC from 1977 to 1997. Currently, PWSC is a wholly owned subsidiary of Tidewater. The merger occurred in 1997. In reference to the map representing the northern CPCN territory of PWSC, the witness noted the area of Baywood Green. In this service territory, PWSC has a system that runs along Long Neck Road next to Baywood Greens (a 10-inch main). The company's focus now is that area–particularly the commercial operations. The second plant was built there as they expected this to be a large growth area. The other areas had either grown out or would remain undeveloped. At the time of this planning, Baywood Greens was seven or eight separate properties. The cost would be minimal to interconnect with Baywood Greens: just the cost of tying into the

main. If Tunnell were required to hook in to the PWSC system, there would be a noticeable impact. There are 1900 customers in the Oak Orchard system. The cost of tying in would be spread out over 15,000 customers (all of Tidewater). The additional customers would also benefit the other Tidewater customers.

On the issue of fire protection, the witness testified that the PSC has requirements for flow and pressure. The PSC has a more stringent regulation than the State Fire Marshal's office--two hour flow versus one hour flow. As PWSC was expanding their Oak Orchard facility, the State Fire Marshal's office conducted testing. In 1998, the system satisfied the State Fire Marshall's pressure and flow requirements.

On cross examination, Mr. Herholdt testified that if there was a need for additional infrastructure to serve the Tunnell project, the cost of adding the infrastructure could be recovered in a number of ways. Assuming the utility had to bear the cost of that infrastructure, the customers of Tidewater would bear the cost through their rates. If Baywood Greens customers were supplied by PWSC, they would be charged the standard PSC approved rates. There are two agencies setting safety standards for water flow, however, the State Fire Marshall's Office is the primary agency responsible for those standards.

The Board considered the testimony of Walter T. Carson.

Mr. Carson testified that he is employed by Tidewater as the maintenance and water quality manager. The witness testified that even though they meet the primary drinking water standards, they may still get complaints involving the secondary standards: staining, hardness, smell, etc.... The witness testified that the PSC has standards for water quality.

The PSC's leverage to address water quality is their control over rates and their penalty authority. If they get a complaint from the PSC, they take a pro-active approach. The witness testified with regard to complaints received from the Moore's Meadow subdivision. Even though the water met primary water quality standards, there was a penalty levied by the PSC. The penalty represented complaints received by Moore's Meadow and others.

On cross examination, Mr. Carson testified that the problems at Moore's Meadow and others were brought to the PSC's attention in connection with a request for a statewide rate increase (a 38% increase). Where a problem such as Moore's Meadow requires correction, all the customers will bear the cost of the correction--including Oak Orchard customers. The PSC has not entered a final order in the penalty case.

On re-direct examination, Mr. Carson testified that complaints can arise independent of the rate increase requests. The PSC regulations, as to water quality complaints, contemplate complaints being made to the utility first, and then reported to the PSC.

SUMMARY OF ARGUMENT ON REMAND ISSUES

PWSC contends that this is not an environmental case but a public utility case. The main issues are the quality of service and the rates--all public service issues. There is no evidence that these areas have been delegated to DPH, and the PSC maintains an active interest in water quality. The central issue is whether Tunnell is a public utility in the supply of water to Baywood Greens. The test is whether there is a significant impact on the public interest. This has two parts--the economic impact on the utility's consumers and the impact on the consumers of Baywood Greens. The primary factors to be considered are:

(1) that water is an essential commodity; and (2) the size of the development. This is not just a small mobile home supplier but a huge development of 726 units and a golf course. PWSC relies upon a series of New Jersey precedents to establish that Tunnell is a public utility in part due to the shear size of the development. The leases are long term and the homes (while manufactured) are far from mobile. Tunnell is also putting in meters, and therefore, the possibility exists that they would be charging for water at some point in the future.

Tunnell contends that its incidental supply of water does not fall within the purview of the PSC as there is no rate to be regulated. Tunnell does not have an area (a monopoly) in which it supplies water and where it would be subject to rate regulation. Here, Tunnell wanted to supply water directly for economic reasons. It contends that PWSC cannot supply Tunnell's needs, and it is only supplying water for its own needs. As Tunnell is not charging for the commodity, it is not "for public use."

Tunnell contends that PSC regulation is only involved when there is an issue of rates. DPH, on the other hand, is involved on a regular basis. It's a competitive rental market, and the market regulates the company–including the quality of the service. Only where there is no market competition does there need to be regulation by the PSC.

Tunnell further contends that this is a self-supply situation. Tunnell is creating a community where it supplies everything other than electronics. It takes care of waste water treatment and manages the land. It is not just supplying water but a bundle of commodities. In support of this contention, Tunnell refers to the new statutory provision--7 Del. C. section 6077(e)--as evidence of the General Assembly's intent to exclude its

community as a self-supplied community.

Tunnell finally contends that there is a detriment to the community if a consumer has signed a lease at Baywood Greens and then has to purchase water from PWSC. There is a huge benefit to the PWSC, but not necessarily to its consumers. Tidewater's 38% rate increase request indicates there will likely never be a benefit to Tunnell's customers. Tunnell's tenants benefit because it cannot charge for water. It is trying to save its customers money.

The agency takes no position on the issues before the Board and asserts that it does not have an advocacy role in this case. It believes this case is a judgment call and that it is a matter of scale as to whether there is a public impact. There will be policy impacts--free enterprise versus deregulation. The agency believes the Board should approach the issues as if Baywood Greens was in a non-certified area and then ask whether there would there be a significant impact were Tunnell to supply water to the community.

In rebuttal, PWSC contends that when the General Assembly created the PSC it did not intend to allow the market to regulate water quality. The key is whether there is a "potential" to impact, and that is affected by the size of the community. If this was not in a certified area, and Tunnell were a public utility, then they would have to get a CPCN and be subject to regulation by the PSC. Whether or not there were CPCN's issued is irrelevant because the standard has been changed by the Delaware Supreme Court. In addition, regulation by the PSC is not only via rates. As well, the PSC has a more stringent standard for safety and fire protection than the State Fire Marshall. Tunnell consumers will

benefit from knowing exactly how much they are paying for water as opposed to some unknown factor. In addition, they can go to the PSC should there be problems.

The parties submitted post-hearing briefs on the issues presented on remand. The briefs and appendices were considered by the Board in rendering their decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The remand from the Superior Court was intended for the Board to consider the evidence in light of the standard set forth by the Delaware Supreme Court in the Eastern Shore II decision.

With regard to the potential environmental impact issues initially presented in this matter, the Board's findings remain the same. We agree with the hearing officer that PWSC has offered little substantive evidence that would constitute grounds to deny the permits on environmental grounds. The evidence presented by PWSC regarding potential salt water intrusion did not establish any likelihood of such intrusion occurring if the wells were operated in accordance with the allocation permits. The evidence indicated at best a disagreement between the experts as to how testing should be accomplished. The evidence presented by Tunnell based upon its testing established that the aquifer is very high yielding and that there would be little or no effect on the aquifer with the anticipated pumping rates. There would be no salt water intrusion. Based upon this evidence, the Board finds now, as it did before, that PWSC did not offer evidence that salt water intrusion was scientifically likely. We further find that there is no significant risk of salt water intrusion to the aquifer given the permitted allocation.

The issue presented on remand is whether Tunnell's activities at Baywood Greens in supplying water to its tenants constitute those of a public utility subject to regulation. The PWSC argues that the Board should consider three factors in making its determination of whether Tunnell is acting as a public utility. First, it suggests the Board consider the inherent size of the project. Second, it asks the Board to consider whether there is an ability to regulate Tunnell's activities. The economic impact is the final factor outlined by the PWSC in its argument.

Tunnell contends that it is not in the business of supplying water with respect to Baywood Greens. As it is a cost of engaging in its primary business, and as it does not profit from this activity, Tunnell's supplying water to Baywood Greens does not implicate the PSC's concerns.

There are at least four government agencies of the State involved in the regulation of potable water. Each has certain public interests that they were designed to protect. Generally, DPH is concerned with the supply of safe drinking water to the public. It also regulates "secondary" factors depending upon the size of the water supplier. DNREC is also concerned with the supply of safe drinking water to the public and to ensure that the sources of that supply are not overtaxed or contaminated. The PSC is primarily concerned with the rates charged by the suppliers and will also address secondary factors in considering those rates. The State Fire Marshall is concerned with the residual water pressure of the suppliers' systems to ensure adequate fire protection. In some aspects of water supply regulation, the jurisdiction of agencies overlap. While each area of public interest protected by these agencies is important, the courts have instructed the Board on

remand to look primarily to the interests protected by the PSC in determining whether Tunnell's activities at Baywood Greens constitutes those of a water utility.

The definition of a water utility comprises any entity operating a water system "for public use." As both the Delaware Supreme Court and the Superior Court have indicated in their decisions, the focus in Eastern Shore II was the phrase "for public use", and the "pivotal" issue "revolved around determining whether the potentially regulated company's activities had a significant impact on the public interest the [PSC] was designed to protect...." The Delaware Supreme Court has given some indication of the scope of the interests the PSC was designed to protect. This includes "preserving and promoting indispensable services while preventing inferior service with excessive and discriminatory rates." In referring to some legislative history, the Court indicates that the PSC has the power to consider the "efficiency, sufficiency, consistency, and adequacy of the facilities provided and the services rendered by any water utility as a factor in rate determination." The history further states that the PSC regulates both the operations and rates of such utilities to assure proper service to the utilities' consumers. As the caselaw reveals, the PSC's primary function is to regulate rates and its secondary function is to address secondary factors within the context of rate regulation. The Board, therefore, initially turns its focus to the economic effects on the consumers.

With regard to the economic impacts on the various consumers involved, the evidence in this matter is somewhat sparse. The record indicates that at the time of its joint request for a rate increase in September of 1999, PWSC's quarterly service charge was $30.00 and it's usage rate was $2.60 per thousand gallons. According to the affidavit

of Robert Lank, Tunnell estimated it could supply the water to Baywood Greens at an approximate cost of $.49 per 1000 gallons. This was based upon the 1995 cost of $108,357 in supplying 2,300 homes with 220 million gallons of water. Lank stated in his affidavit that he believed the usage figure to be suspect because PWSC–in 1996–had supplied 2,352 customers at a cost of $451,472 with only 78 million gallons. Tunnell contends the larger consumption figure was due to large amounts of water expended on public areas including swimming pools. Nonetheless, even were the usage the same, Tunnell's usage rate per thousand gallons would still be slightly more than half of that charged by PWSC.

This difference is not surprising given that Tunnell does not have the same overhead and administrative cost structure as a separate water utility such as PWSC. As the Doane affidavit states, the supply of water to Baywood Greens by Tunnell does not entail a large administrative expense because it is part of an integrated business operation. In addition, Tunnell does not make a profit directly off the supply of water to its tenants. It makes its profits from rents and golf fees.

A comparison of rates between PWSC and a neighboring water utility, the Long Neck Water company ("Long Neck"), has also been suggested due to Tunnell's approximately 70% ownership interest in Long Neck. While not the best comparison given the part ownership and the fact the Board is addressing a separate corporate entity, it provides some facts that are not entirely irrelevant to the Board's assessment of this situation. The record reveals one point of comparison. In 1996 both PWSC and Long Neck provided unmetered residential water usage at a flat rate per quarter. Long Neck's

rate was $55.00 per quarter and PWSC's rate was $56.00 per quarter. From this the Board finds that between these neighboring water utilities, the one with the ownership connection to Tunnell was able to supply the service at a marginally cheaper rate.

Given the above, the Board finds that Tunnell has the ability to supply water cheaper to its tenants–albeit in an unregulated situation.

This finding assumes that PWSC is able to adequately supply the development in the first place. On the latter assumption, the Board finds that PWSC is not in a position presently to supply the entire development. While PWSC can likely supply the first fifty tenants of Baywood Greens, it will not be able to supply the entire development without the addition of another well. The Board did not consider the testimony of Mr. Beetschen to be very credible. He initially testified that PWSC would have to add an extra well in order to meet the capacity required by Baywood Greens. He later changed that opinion to indicate it could supply the development with the addition of a booster pump. This would assume. however, PWSC received another well allocation permit.

On cross examination, it became evident that Mr. Beetschen's opinion was based upon unrealistic usage figures that were almost two times less than the average daily consumption for PWSC's own users, and up to five times less than the average daily consumption estimates utilized by Tunnell in the design of the Baywood Greens system. Tunnell, on the other hand, has the ability at present to supply the entire development. The water supplied by Tunnell is more than adequate to meet the needs of the residences and the residual pressure necessary to ensure adequate fire protection.

What of the economic impact on the customers of PWSC should Tunnell be able to

supply water to its tenants? PWSC contends that it would lose the benefit of the additional customers to its existing customer base. According to the Lank affidavit, if PWSC supplies Baywood, it would represent a significant addition of 726 customers to a customer base (as of 1996) of 2, 352 residential customers. This situation changed in 1997 when PWSC became a wholly owned subsidiary of Tidewater Utilities, Inc. ("Tidewater"). According to the testimony of Thomas Herholdt, the cost of tying Baywood in to their system would be spread out among Tidewater's 15,000 customers.

Estimates for this cost have ranged from less than $10,000 to extend the line to Baywood's doorstep and tie in to Baywood's system, to upwards of $40,000 if a booster pump needed to be added. These figures did not consider Mr. Beetschen's initial opinion that an additional well and allocation permit would be needed–a situation that would raise the estimates even further. These figures also assume that Tunnell will donate its infrastructure to PWSC. Given the extent of this litigation and the nature of the relationships between the parties, PWSC assumes an unlikely event.

The Board has received no estimates of the cost of this infrastructure. It is fair to infer that it would likely eclipse by a substantial sum even the highest estimates set forth by PWSC to tie into the system. The cost of that infrastructure, as well, would have to be absorbed by the 15,000 customers of Tidewater. The costs of the tie in and booster pump at least would be incurred immediately. The time frame for absorbing the other costs would be speculative. Nonetheless, whatever benefits the additional customers would bring to the Tidewater customers will not be fully realized until 15 years hence. According to Robert Tunnell, the plan is to lease 50 lots per year over a 15 year period. In the

meantime, the Tidewater customers would be bearing the additional costs without all the additional benefits.

Other than what the Board has inferred above, neither party has been able to provide the Board with anything more than a vague indication of how the graduated addition of the 726 Baywood customers would impact the rates of a 15,000 Tidewater customer base. It is unlikely to reduce rates given that in 1999 Tidewater and PWSC sought a 38% increase in rates. Over the long run (fifteen plus years hence) there might be some slight effect, but based upon the evidence before it, the Board finds that it will not be a significant economic impact.

Will the customers of Baywood be protected from the threat of excessive and discriminatory rates for which the PSC was created to protect the public? The Board finds that the furnishing of water by Tunnell to the tenants at Baywood Greens is incidental to its business of renting mobile home spaces. Tunnell, with respect to Baywood Greens, is not in the business of supplying water. The cost and quality of the service is not separable from its business of renting residential space and it is part of the overall cost of leasing a lot at Baywood Greens. As such, there is no distinct rate to be regulated. Furthermore, any concerns regarding the so-called secondary factors are regulated by other State agencies such as the DPH. In this scenario, the competition of the rental market will be the regulating influence. Should the quality and charge for the bundled services at Baywood Greens become excessive, the consumer has the option to search elsewhere for more economical rental space. Obviously, these situations are determined on a case-by-case basis, and should the facts change in the future, Tunnell may become subject to

PSC regulation.[1]

The Board did not consider the size of the development to be determinative. While the size of the development being served is a factor in accessing the economic impact on the parties and their consumers, it is not particularly significant in light of current Delaware caselaw with its concentration on rates and the quality of the water service. If size were the determinative factor, then many of the self-supplying communities listed in the attachment to the McDowell affidavit would be under PSC regulatory control or served by a regional water utility.

Finally, the Board briefly touched upon the issue of so-called "destructive competition" between unregulated companies and regulated utilities. The Board does not find that such a situation exists here. This is not a case where an unregulated company is attempting to acquire customers solely for the purpose of supplying water to those customers. As Tunnell has argued from day one, its primary business is to lease lots and the use of its golf course. The supply of water is incidental to their primary business purpose. This is not a situation where a non-regulated company comes in and "cherry picks" the preferred customers and thereby creates adverse consequences to the existing utility and its customers.

The balance of competing forces in this matter--competition versus regulation and property rights versus public monopoly--was addressed by the DNREC hearing officer in

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[1]All the Board members were concerned with Tunnell's installation of water meters for each rental space. While purportedly they are for the purpose of monitoring sewerage flow, the Board took note of the future potential for the meters being used to assess water usage and impose rates.

his opinion of November 12, 1996. Based upon his analysis of the legislative history of sections 6075 and 6077, the hearing officer reached the conclusion that the legislative trend is to protect private landowners from water utility overreaching and agency efforts toward regionalization–especially in rural areas. The recent legislative lobbying efforts on behalf of both parties, and the resulting statutory changes, would tend to support the hearing officer's conclusion. The additions to both sections in April and July of last year protect the private property interests of farmers and existing mobile home communities with the exception of a person acting as a water utility without a CPCN. Thus, the rights of certain classes of private property owners would tend to prevail over a utility with one exception. That being where another water utility is trying to coopt another utility's certificated area. The Board has concluded that such an exception is not the case in this litigation.

STATEMENT OF DETERMINATION

The Board concludes that Tunnell's provision of water to its tenants as part of a bundle of services is incidental to the business of renting lots and the use of its golf course. It is neither in the business of, nor starting the business of, selling water. Tunnell's provision of water to its tenants does not have a significant impact on the areas of public interest protected by the PSC. Accordingly, the Board concludes that Tunnell is not operating a "water utility" at Baywood Greens. The Board upholds the Secretary's Order

issuing the permits to Tunnell.

SO ORDERED this 9th th day of February , 2001.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

Robert Ehrlich
Board Member

Date: 27 January 2001

Diana Jones

Diana Jones
Board Member

Date: 2/2/01

Donald E Dean

Donald Dean
Board Member

Date: Jan 28, 2001

The following Board members dissented with this decision.

Joan Donoho

Joan Donoho
Chairperson

Date: 1/29/01